HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL No. 23 OF 2003.

Mr. Shashikant Bhaskar Sawant,
Age about 45 years, Occu: Service,
R/a: 61/F, Kamgar Nagar,
Kurla (East), Mumbai – 400 024. ..Appellant.

Versus.

1. Mrs. Smita S. Sawant,
Age: 39 years, Occu: Service,
R/a: C/o: Manohar Chavan,
7/8, Shivam Hsg. Society,
Triveni Nagar, Kurar Village,
Malad (East), Mumbai – 400 097.

2. Mr. Anil D. Bhatt,
Age: 38 years, Occu: Service,
R/a: Near Vakola Village,
Santacruz (E), Mumbai. .. Respondents.

Smt. P. V. Badadare for the Appellant.

Shri. H. A. Pawar for the respondent no.1.

CORAM: S. B. MHASE, &
S. R. SATHE, JJ.

DATE: 30th August 2006.

ORAL JUDGMENT:

1. The Appellant – original petitioner husband in M. J. Petition No. A-310 of 2000 has preferred this appeal against the

judgment and Order passed by the Judge, Family Court No. 4-Mumbai whereby the Petitioner's petition for divorce filed on the grounds of cruelty, desertion and the allegation that the Respondent – wife had voluntary sexual intercourse with the Respondent No. 2, was dismissed. For the sake of convenience, hereinafter the parties shall be referred to as "the Petitioner" and "the Respondent".

2. The brief facts giving rise to this petition are as under:

2.1. The Petitioner got married with the Respondent as per the Hindu rites on 24th June 1991 at Dadar, Mumbai. At the time of marriage the Respondent No. 1 was serving in J. B. Chemicals Company at Worli. It was an arranged marriage. After marriage, the Respondent No. 1 started residing with the Petitioner. The Petitioner's parents and one brother were also residing with the Petitioner.

2.2 It is the case of the Petitioner that the Respondent No. 2 was serving in J. B. Chemicals Company along with the Respondent No. 1. The Respondent No. 1 always used to talk about the Respondent No. 2 who used to sit in front of the table of the Respondent No. 1. On one occasion the Petitioner found that there were some lines drawn by the

ball-point pen on the right hand of the Respondent No. 1. The Petitioner asked the Respondent No. 1 about the same, and she replied that it happened while working. The Petitioner asked the Respondent No. 1 as to how that can happen when she holds the pen in right hand. The Respondent No. 1 did not give any explanation for the same. As a result of the same, the Petitioner got doubt that those lines must have been drawn on the right hand of the Respondent No. 1 by the Respondent No. 2.

2.3 According to the Petitioner, the Respondent No. 1 was in the habit of speaking about her colleagues and about her past love affairs. She also used to tell about the comments made by the road-side Romeos. The Petitioner often told her that he was not interested in listening those things and she should not tell anything, but the Respondent No. 1 did not give heed to it and continued the said habit. On one occasion, when the Petitioner and the Respondent No. 1 had gone to the Respondent No. 1' parents house, the Respondent No. 1 showed one saree, blouse piece and petty-coat to the Petitioner and told that the same were gifted by her father' friend. Naturally, the Petitioner asked her about the name of the said friend, but she did not disclose the said

name. Due to all these circumstances, the Petitioner thought that the Respondent No. 1 has affair with the Respondent No. 2. He told this thing to his father and to the parents of the Respondent No. 1. The parents of the Respondent No. 1, however, told him that the Petitioner should not raise any doubt and the Respondent No. 1 was not having any love affair prior to marriage.

2.4. In the year 1992, the Respondent No. 1 was sick and the doctor had advised her to take bed rest for two-three days. When the Petitioner and the Respondent No. 1 were returning from the Doctor, the Respondent No. 1 told the Petitioner that when she had telephoned her boss, he asked her to resume the office immediately. The Petitioner also asked the Respondent No. 1 as to why she phoned her boss and why she did not ask the Petitioner' father to inform the office, the Respondent No. 1 told him that the Petitioner's father was not at home and as such she went out of the house and phoned her boss. When the Petitioner asked his father about the same, he came to know that his father was very much in the house. So, this conduct on the part of the Respondent No. 1 also created some doubt. The Petitioner therefore contacted the Respondent No. 1's office and one

officer by name Smitha Zavare told the Petitioner that she had in fact asked the Respondent No. 1 to take rest and then attend the office.

2.5 It is the Petitioner's case that the Respondent No. 1 was in the habit of running to her parents' house very often. In the year 1992, she stayed at parent's house for 45 days and in the year 1993 and 1994 she stayed with her parents for 105 days in each year. Though the Respondent No. 1 was serving for a long time and getting good salary she never used to spend any money for household expenses but only used to purchase vegetables and her own railway pass. The Respondent No. 1 also did not include her name in the Ration Car. Not only that but when the Petitioner made an attempt in that behalf, the Respondent No. 1 picked up quarrel. Ultimately, the Petitioner included the names of his two children in the Ration Card on 17th January 1998.

2.6 The Petitioner and the Respondent No. 1 have two issues, namely, daughter- Akshata, born on 13th May 1994 and son – Sidhesh, born on 7th December 1995. It is alleged that when the Respondent No. 1 delivered the second child, her parents even did not inform the Petitioner about the

birth. After delivery of the second child the Respondent No. 1 did not return home for a long time and almost after 16 months on 29th August 1996 all of a sudden the Respondent No. 1 returned to her matrimonial home. According to the Petitioner he was trying to secure a separate accommodation and was trying to get finance for the same. He therefore asked the Respondent No. 1 about her savings, but the Respondent No. 1 flatly refused to give any information and on the contrary told the Petitioner that he had no right on her money. As a result of the same, the Petitioner got annoyed and gave one slap to the Respondent No. 1. The Respondent No. 1 therefore, went out of the house and called her parents and brother, and when they came, they asked the Petitioner to accompany them to the Police Station. Accordingly, the Petitioner went to Nehru-nagar Police Station where he was made to sit in the Police Station till 6.00 p. m. In the meantime, the Respondent No. 1 took away her belongings and locked the house and handed over the key to the Police Station.

2.7 According to the Petitioner, after the above incident, on several occasions he made efforts to bring the Respondent No. 1 back to matrimonial home, but there was no favourable

response from the Respondent No. 1. Finally on 13th November 1999 the Petitioner issued a legal notice to the Respondent No. 1. The Respondent No. 1 did not give any reply. The Petitioner therefore issued a reminder through an Advocate on 22nd November 1999, to which the Respondent No. 1 gave a false reply and contended that she was harassed, ill-treated and abused by the Petitioner and as such she was constrained to leave the matrimonial home. She showed willingness to return to the matrimonial home only on the Petitioner giving an assurance that he will not ill-treat her. Thereafter the Petitioner filed one complaint with the Social Security Cell at Crawford Market, Mumbai and finally filed the marriage petition for divorce and claimed divorce on the grounds mentioned under Section 13(1)(i), 13 (1)(i-a) and 13(1)(i-b) of the Hindu Marriage Act, 1955.

2.8 The Respondent No. 1 filed her Written Statement at Exhibit-20 and admitted the factum of marriage and that she has given birth to two children. She also admitted that the Respondent No. 2 was serving in the J. B. Chemicals Company. She however denied all other allegations made by the Petitioner. It is her contention that when she used to return home from office she used to share her experience in

the office with the Petitioner. But she never used to tell anything about the comments made by the road side romeos, as alleged by the Petitioner. The Respondent No. 1 also contended that the Petitioner had in fact inferiority complex, and merely because the Respondent No. 2 was her colleague the Petitioner used to raise several doubts about her character and used to force her to admit about her relations with the Respondent No. 2. The Petitioner often used to say that it is difficult to accept that a serving woman had no relations or affairs with her colleagues.

2.9 The Respondent No. 1 admitted that she had shown a saree, blouse piece and petty coat to the Petitioner. According to her, her father's friend had in fact invited the Petitioner and the Respondent No. 1 for a dinner and at that time he had given the said articles to her. Though the Petitioner was invited he had not attended the dinner. The Respondent No. 1 therefore contended that all the allegations made by the Petitioner in respect of her relations with the Respondent No. 2 are false.

2.10 The Respondent No. 1 further contended that the mother of the Petitioner was ill and as a result of the same

she was not in a position to do any work in the kitchen. Naturally, the Respondent No. 1 used to cook for the family. It is also contended that she often used to spend for the household expenses. According to her, she also provided her money to the Petitioner for the purchase of flat, and for that purpose had even pledged her ornaments which subsequently got released by her. The Respondent No. 1 also contended that after the birth of second child she started residing with her parents, however the Petitioner never bothered about the Respondent No. 1 and the minor child. He never made efforts for re-conciliation. It is her case that as the Petitioner often used to make wild allegations against her and used to beat her and harass her, she had even filed a complaint against him in the Police Station. She further contended that as a result of harassment given to her, she was constrained to leave the matrimonial home. The Respondent No. 1 therefore contended that the petition for divorce as well as the Petitioner's claim for the custody of minor children be dismissed.

2.11 The Respondent No. 2 filed his Written Statement at Exhibit-19 and admitted that he is working in J. B. Chemicals Company, Worli and the Respondent No. 1 is his

colleague. He however categorically denied that he has any love affair with the Respondent No. 1 and prayed for the dismissal of the petition.

3. On these pleadings, the learned trial Judge framed issues at Exhibit -26. In order to prove his case the Petitioner examined himself at exhibit 37 and two other witnesses, namely, Anil Dhuri (Exhibit-52) and the Petitioner's brother-in-law Arun Sadarjoshi (Exhibit-53). He also produced copies of the notices issued to the Respondent No. 1 on 13th November 1999 and 22nd November 1999 and copy of the Reply given by the Respondent No. 1 at Exhibit-49. The Respondent No. 1 filed her affidavit of evidence however it appears from the record that, thereafter when the matter was fixed for cross examination of the Respondent No. 1, she remained absent. The matter was therefore closed for arguments. Both the sides filed written arguments and after considering the same and hearing the respective Advocates, the learned trial Judge came to the conclusion that the Petitioner has totally failed to prove the allegations made in the petition and has thus not made out any case for divorce or even for custody of the minor children. Naturally he dismissed the petition.

4. Being aggrieved by the above mentioned Order, the Petitioner has filed the present appeal. In this appeal before us, Smt. Badadare, learned Advocate for the Petitioner has urged only three points: Firstly, she submitted that the Petitioner has categorically stated as to how the conduct of the Respondent No. 1 was sufficient to create doubt about her character and her relations with the Respondent No. 2; Secondly, it was canvassed that the conduct of the Respondent No. 1 caused mental cruelty to the Petitioner and it was the Respondent No. 1 who ultimately deserted the Petitioner without any just cause. It was also argued that the Respondent No. 1 has totally failed to adduce any evidence, therefore, it should be held that the evidence adduced by the Petitioner is sufficient to prove his case. It was therefore submitted that the appeal be allowed and decree for divorce be passed and the minor children be given in the custody of the Petitioner. As against this, the learned Advocate for the Respondent No. 1 supported the judgment and order passed by the learned trial Judge.

5. It is not in dispute that the marriage between the Petitioner and the Respondent No. 1 took place on 24.6.1991 and out the said wedlock they have two children, namely, Akshada and Siddesh born on 13.5.1994 and 7.12.1995

respectively. It is also an admitted fact that the Respondent No. 1 was serving in J. B. Chemicals since prior to her marriage and the Respondent No. 2 is also serving in the same Company. It is the case of the Petitioner that the Respondent No. 1 had affair with the Respondent No. 2, and as a result of the same the Petitioner has in fact claimed divorce on the ground of Section 13 (1)(i-a) of the Hindu Marriage Act, 1955. To secure divorce on the said ground, the Petitioner has to prove that after solemnization of marriage, the Respondent No. 1 had voluntary sexual intercourse with the Respondent No. 2 as alleged. At the outset it must be mentioned that even in the petition the Petitioner has nowhere specifically alleged that the Respondent No. 1 had voluntary sexual intercourse with the Respondent No. 2. So, in the absence of any specific pleading in that behalf no amount of evidence can be looked into for the said purpose. Mere mentioning in the petition that the divorce is claimed on the ground of Section 13(1)(i-a) of the Hindu Marriage Act, 1955 is not sufficient. It is true that it would be unreasonable to expect direct evidence regarding the adultery. Accepted rule therefore is that circumstantial evidence is all that can normally be accepted in proof of the charge of adultery. Naturally, it was the duty of the Petitioner to bring on record specific circumstances to show that from such circumstances a reasonable inference regarding

adultery can be drawn. When the Petitioner has said that he had a doubt that the Respondent No. 1 had an affair with the Respondent No. 2 it was necessary for him to show as to what events took place which led him to draw such conclusion or doubt. So, alleged circumstances must be of such nature which would create suspicion about the character of the Respondent No. 1 and in particular about the alleged adultery. It is true that the Respondent No. 1 has failed to offer herself for cross examination. So her affidavit of evidence is in fact of no use. But one cannot ignore the fact that this is a case filed by the Petitioner husband for divorce. Naturally, the Petitioner must stand or fall on his own case. Lacunae in the evidence of the Respondent No. 1 would not help the Petitioner to prove the serious allegations that have been made against the Respondent No. 1.

6. The Respondent No. 1 in her Written Statement has stated that the allegations with regard to finding of pen marking lines on her hand are false. Even if we assume for the sake of argument that there were some pen marks on the right hand of the Respondent No. 1, still then it is very difficult to jump from such circumstance to the conclusion that the said lines were drawn by the Respondent No. 2, and that the same were

sufficient to jump to the conclusion that there was sexual intercourse between the Respondent No. 1 & the Respondent No. 2. It is pertinent to note that the Petitioner has only vaguely stated that he found some pen markings on the right hand of the Respondent No. 1, but he has not at all given any details about the same. He has not stated as to whether the said markings were on palm or on any other portion of the right hand. So, those circumstances are certainly not sufficient to draw an inference of adultery.

7. It is the case of the Petitioner that the Respondent No. 1 had shown her one saree, blouse piece and petty coat to him and told him that the same were given by her father's friend. He has also stated that when he made a query in that behalf, the Respondent No. 1 did not tell the name of the friend of her fatehr. It is true that normally when such query is made, wife was expected to tell the name immediately. It is pertinent to note that it is not even the Respondent's case that she had told the name of the father's friend. What is more to be noted is that even in the Written Statement or in the affidavit of evidence she has not given the name of the said person who had given those articles by way of gift to her. However, curiously enough the Petitioner himself has admitted in cross examination that one

Vilas Raje. is the friend of the Respondent's father and he might have given the said articles to the Respondent No. 1. So, under such circumstances merely because some such clothes were given by way of gift to the Respondent No. 1, one cannot jump to the conclusion that the Respondent No. 1 had illicit relations with the Respondent No. 2.

8. The Petitioner has also made an attempt to show that the Respondent No. 1 used to give phone calls to her office without informing him. However, the Petitioner's evidence in that behalf is also not worthy of credence. In fact, the above mentioned three incidents are so vague and scanty that under no circumstances any prudent man would come to the conclusion that the said circumstances were even sufficient to raise any doubt about the character of the Respondent No. 1 and in particular about the relations between the Respondent No. 1 and the Respondent No. 2.

9. It is worth to note that the Petitioner himself has admitted that only on one occasion he had seen the Respondent No. 1 along with the Respondent No. 2 outside their office. However, he has not given any details such as when and at what time they were seen together, what they were doing, what was the

immediate re-action of the Petitioner at that time. So, when all such details are not given, merely because the Respondent No. 1 was seen along with the Respondent No. 2 outside the office on one occasion, it cannot be said that the Petitioner has proved that the Respondent No. 1 had sexual intercourse with the Respondent No. 2.

10. There is another important aspect of the matter. The Petitioner has stated that when he got suspicion that the Respondent No. 1 is having affairs with the Respondent No. 2 he told this fact to his parents, however those parents have not been examined by him. Not only that but he has also not stated as to what action his parents took at that time. The Petitioner has stated that he told about his doubt to his friend Anil Dhuri and his brother in law Anil Sadarjoshi. Both of them have stated that the Petitioner had expressed such doubt. But what is more important to note is that when these persons told the Petitioner that they would try to meet the Respondent No. 2 and make him to understand that he should not behave like that or give a warning to him, the Petitioner told them not to do so. It is very clear that neither the Petitioner nor his friends or relatives made any attempt to keep a watch on the activities of the Respondent Nos. 1 & 2 to find out about their relations. They never made

any inquiry with the staff members working in the office of the Respondent Nos. 1 and 2. So, all this conduct of the petitioner is very unnatural and abnormal. If any husband is having a doubt that his wife is having illicit relations with a particular person then he is bound to make a detailed inquiry in that behalf to get convinced about their relations. However, in the instant case the Petitioner has in fact not taken any trouble to find out the truth and by relying on some very flimsy circumstances which had no direct bearing on the relations, tried to jump to the conclusion that the Respondent No. 1 was having illicit relations with the Respondent No. 2.

11. There is yet another circumstance which also creates doubt about the version of the Petitioner. The Petitioner has issued two notices through his Advocate to the Respondent No. 1. The same are dated 13th November 1999 and 22nd November 1999 produced at Exhibit-48. If we peruse the said two notices, we find that in that notices, nowhere even it was suggested that the Respondent No. 1 was having illicit relations with the Respondent No. 2 or that her character was not good. It was only vaguely stated in the said notices that because of her nature and behavior the Petitioner was in utter tension. So, such type of cryptic notices also creates doubt about the present allegation

made by the Petitioner. If really the Petitioner had any such grave doubt then certainly it should have been specifically reflected in the notices. But that has also not happened. Thus, having regard to all the facts and circumstances of the case and the evidence on record, we have absolutely no hesitation to hold that the alleged circumstances that have been placed on record by the Petitioner are certainly not sufficient even to create a doubt that the Respondent No. 1 had illicit relations with the Respondent No. 2. So, we are of the considered view that the learned trial Judge has rightly negatived the Petitioner's allegations in this behalf.

12. It is the case of the Petitioner that the conduct of the Respondent No. 1 caused mental cruelty to him. According to him the Respondent No. 1 was in the habit of telling him about her previous love affairs. However, curiously enough the Petitioner has not stated anything about any such love affair and what exactly was told to him by the Respondent No. 1. So, merely a statement in this behalf is not sufficient to show that such disclosure of the Respondent No. 1 caused any mental torture or agony to the Petitioner. It is needless to say that while making out a case for mental cruelty the Petitioner has to prove that the conduct charged as cruelty was of such a character as

to cause in the mind of the Petitioner a reasonable apprehension that it will be harmful or injurious for the Petitioner to live with the Respondent no.1. In the instant case the Petitioner has in fact made false, baseless and reckless serious allegations touching the character of the Respondent No. 1. So, that must have in fact caused torture to the Respondent No. 1. Firstly, it is not proved that the Respondent No. 1 had refused to give details about her savings. Besides this, even if we assume that she had refused to give the same that by itself cannot be said to be sufficient to cause the mental cruelty as contemplated under Section 13(1)(i-a) of the Hindu Marriage Act, 1955.

13. It was tried to be shown by the Petitioner that the Respondent No. 1 often used to leave the matrimonial home without intimation. However, if really that would have been so, the Petitioner would not have kept mum for long time and would have taken proper steps to call the Respondent No. 1. But that has also not happened. The Respondent No. 1 has stated in her Written Statement that as the Petitioner was ill-treating her and assaulting her, she was constrained to leave her matrimonial home. Admittedly, the Respondent No. 1 had even filed a criminal complaint about the alleged ill-treatment meted to her. In fact the Petitioner himself has stated in his petition as well as

in his evidence that as the Respondent No. 1 did not tell him about her savings, he gave a slap to her. We cannot ignore the fact that the Petitioner as well as the Respondent No. 1 are both well educated persons; Both are having service; They are coming from a middle class. So, under such circumstances even if we assume that the Respondent No. 1 had refused to give information about her savings, still that was not justifiable for the Petitioner to give a slap to her. So, the conduct of the Petitioner must have hurt the Respondent No. 1 and she must have felt humiliated and insulted by such conduct of the Petitioner. So, under such circumstances if she has left the house, it cannot be said that she has deserted the Petitioner as envisaged under Section 13(1)(i-b) of the Hindu Marriage Act. Besides this, it has come on record that after the Petitioner gave notice to the Respondent No. 1 she gave reply Exhibit-49 and told the Petitioner that she is ready to co-habit with him provided he gives an undertaking or assurance that she will not be ill-treated. However, the Petitioner did not respond to the said reply. So, this reply also goes to show that there was no intention on the part of the Respondent No. 1 to put an end to co-habitation permanently. In order to prove “desertion” as contemplated under Section 13(1)(i-b) of the Hindu Marriage Act, 1955, two essential conditions must be there, namely, one, the

factum of separation, and secondly, the intention to bring co-habitation permanently to an end (i.e. animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned: One, the absence of consent, and second, absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. Bearing in mind these essential requirements of the Section, we have no hesitation to hold that the Petitioner has also failed to make out a case of desertion.

14. Though the Petitioner has claimed the custody of minor children he has not adduced any evidence worth the name to show that the circumstances of the case require that the custody of the minor children should remain with him. He has failed to show that the welfare of the children will be better served if the custody of the minor children is given to him. So, taking into consideration these aspects the learned trial Judge has rightly negatived the Petitioner's claim in this behalf.

15. Having regard to the entire evidence on record, it is clear that the learned trial judge has considered the evidence in its proper perspective and has rightly dismissed the petition.

There is no reason to interfere with the said finding. Hence, appeal is dismissed.

(S. R. SAHTE, J.) (S. B. MHASE,J.)